

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: McKenzie Dean	Team: Squad #2	CCRB Case #: 201905717	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Saturday, 06/29/2019 4:00 AM	Location of Incident: § 87(2)(b)	Precinct: 41	18 Mo. SOL 12/29/2020	EO SOL 8/15/2021	
Date/Time CV Reported Sat, 06/29/2019 4:03 PM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Sat, 06/29/2019 4:03 PM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Witness(es)	Home Address
§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. POM James Foy	20456	963349	041 PCT
2. POM Harry Kerr	22551	962522	041 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM William Conklin	03651	963464	041 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Harry Kerr	Abuse: Police Officer Harry Kerr threatened to arrest § 87(2)(b)	§ 87(2)(b)
B.POM James Foy	Abuse: Police Officer James Foy entered § 87(2)(b) in the Bronx.	§ 87(2)(b)
C.POM Harry Kerr	Abuse: Police Officer Harry Kerr entered § 87(2)(b) in the Bronx.	§ 87(2)(b)
D.POM James Foy	Force: Police Officer James Foy used physical force against § 87(2)(b)	§ 87(2)(b)
E.POM James Foy	Abuse: Police Officer James Foy damaged § 87(2)(b)'s property.	§ 87(2)(b)
F.POM James Foy	Discourtesy: Police Officer James Foy spoke discourteously to § 87(2)(b)	§ 87(2)(b)

Case Summary

On June 29, 2019, § 87(2)(b) filed this complaint with the CCRB over the phone. The case was initially assigned to Inv. Kenneth Shelton. It was reassigned to Inv. McKenzie Dean on May 6, 2021, upon Inv. Shelton's resignation from the Agency.

On June 29, 2019, at approximately 4 AM, Police Officer James Foy and Police Officer Harry Kerr of the 41st Precinct, arrived at § 87(2)(b) in the Bronx in response to multiple 911 calls by § 87(2)(b)'s ex-boyfriend, § 87(2)(b) reporting that § 87(2)(b) was not allowing him to retrieve his property from her apartment, where he too resided (**BR 21; BR 22**). Police Officer Kerr, Police Officer Foy, and § 87(2)(b) went up to § 87(2)(b)'s apartment § 87(2)(b) and the officers told § 87(2)(b) that § 87(2)(b) wanted to retrieve his belongings from her apartment. She told the officers that they could not enter, and that § 87(2)(b) would need to obtain a court order. Police Officer Kerr allegedly told § 87(2)(b) that if she did not allow the officers and § 87(2)(b) to enter her apartment, then she would be arrested (**Allegation A: Abuse of authority – Threat of arrest**, § 87(2)(g)). § 87(2)(b) attempted to close her door, but Police Officer Foy placed his foot in the doorway and forced his way into her apartment (**Allegation B: Abuse of authority: Entry of premises**, § 87(2)(g)). Police Officer Kerr entered behind him (**Allegation C: Abuse of authority – Entry of premises**, § 87(2)(g)). As he entered the apartment and while inside the apartment, Police Officer Foy pushed § 87(2)(b) several times (**Allegation D: Force – Physical force**, § 87(2)(g)). At one point, Police Officer Foy pushed § 87(2)(b) into her bathroom, closed the door, and held it shut, allegedly causing damage to it (**Allegation E: Abuse of authority – Property damaged**, § 87(2)(g)). Throughout his interaction with § 87(2)(b) Police Officer Foy made various statements toward her that included the word “fuck” (**Allegation F: Discourtesy** – § 87(2)(g)). § 87(2)(b) collected his belongings and the officers left. No civilians were arrested or summonsed during the incident.

BWC video was received from the cameras of Police Officer Foy, Police Officer Kerr, and Police Officer William Conklin of the 41st Precinct. The footage is attached in IAs #42-47 (**BR 05-10**) and is summarized in IA #114 (**BR 11**).

Findings and Recommendations

Allegation (A) Abuse of authority: Police Officer Harry Kerr threatened to arrest § 87(2)(b)

§ 87(2)(b) was interviewed on July 8, 2019 (**BR 01**). Police Officer Foy was interviewed on January 28, 2020 (**BR 02**), Police Officer Kerr was interviewed on January 8, 2021 (**BR 04**), and Police Officer Abel Dupres of the 41st Precinct was interviewed on January 12, 2021 (**BR 03**). § 87(2)(b) did not respond to the investigation's attempts to obtain a statement from him.

It is undisputed that, prior to the officers' interaction with § 87(2)(b) § 87(2)(b) made four calls to 911 and reported in each call that he was trying to get his property out of his ex-girlfriend § 87(2)(b)'s apartment, where he too resided, and that she was not allowing him inside to get his property. Police Officers Foy and Kerr responded after the first two calls and met with § 87(2)(b) outside the apartment. The officers spoke with § 87(2)(b) and left without speaking with § 87(2)(b) § 87(2)(b) made two more calls to 911 over the next two hours and reported the same information and Police Officers Foy and Kerr responded again. On this second occasion, they knocked on the door and § 87(2)(b) answered.

§ 87(2)(b) stated that when she opened the door, Police Officer Foy said that they were at her apartment to retrieve § 87(2)(b) belongings. § 87(2)(b) told the officers that it was not the appropriate time and she was told by the court system that § 87(2)(b) would need a court order to do this. Police Officer Kerr told § 87(2)(b) that if she did not allow the officers and § 87(2)(b) to enter her apartment, then she would be placed under arrest. He did not state what § 87(2)(b) would be arrested for.

Police Foy stated that he and Police Officer Kerr were assigned § 87(2)(b) initial 911 call as a “family dispute.” The only information communicated to them was that there was a man who wanted to collect his belongings from an apartment. Police Officer Foy and Police Officer Kerr responded to the location, where they found § 87(2)(b) outside of the apartment. § 87(2)(b) explained to the officers that he lived in the apartment and he was trying to get his belongings from inside. Police Officer Foy approached the door with § 87(2)(b) and knocked, but no one answered. Police Officer Foy told § 87(2)(b) to call the police in the morning for assistance in retrieving his belongings. This initial interaction between the officers and § 87(2)(b) lasted approximately 15 minutes and the officers left without speaking with § 87(2)(b).

Two hours later, the officers were again assigned to another 911 call by § 87(2)(b) with the same information as the earlier call. Police Officer Foy and Police Officer Kerr responded to § 87(2)(b) a second time. When the officers arrived, § 87(2)(b) was outside on the street, where they spoke with him. § 87(2)(b) told the officers that § 87(2)(b) was now answering her phone and that she was inside the apartment. Police Officer Foy and Police Officer Kerr decided to go to the apartment a second time because they believed that § 87(2)(b) was just going to call 911 again and Police Officer Foy wanted to remediate the situation while they were at the scene. Police Officer Foy stated that this interaction was different from the first time the officers responded to the location because § 87(2)(b) was answering her phone when § 87(2)(b) called, and § 87(2)(b) believed that she was inside the apartment now. When Police Officer Foy, Police Officer Kerr, and § 87(2)(b) arrived at § 87(2)(b)'s apartment this second time, Police Officer Foy knocked on the door. After one or two knocks, § 87(2)(b) opened the door and asked the officers what they wanted. Police Officer Foy stated that he did not recall either himself or Police Officer Kerr threatening to arrest § 87(2)(b) for not allowing the officers and § 87(2)(b) inside her apartment.

Police Officer Kerr did not recall if he told § 87(2)(b) that if she did not let the officers inside the apartment, then she would be arrested. When asked if § 87(2)(b) could have been arrested during the incident, Police Officer Kerr said he did not think she could be.

The audio in Police Officer Foy's and Police Officer Kerr's initial BWC videos (BR 05; BR 07) does not begin until 30 seconds into each video. This silent portion of both videos depict the majority of the conversation that occurred before § 87(2)(b) attempted to close her door while speaking with the officers, which is the point during which she alleged Police Officer Kerr brought up the possibility of arrest.

§ 87(2)(g)

Allegation (B) Abuse of authority: Police Officer James Foy entered § 87(2)(b) § 87(2)(b) in the Bronx.

Allegation (C) Abuse of authority: Police Officer Harry Kerr entered § 87(2)(b) § 87(2)(b) in the Bronx.

Allegation (D) Force: Police Officer James Foy used physical force against § 87(2)(b).

It is undisputed that § 87(2)(b) called 911 and requested officers to help him retrieve his belongings from § 87(2)(b)'s apartment, where he had previously been living. Police Officer Foy and Police Officer Kerr knocked on § 87(2)(b)'s door. § 87(2)(b) who was naked and wrapped in only a blanket, opened the door. The officers told § 87(2)(b) to let § 87(2)(b) inside so he could get his property. Police Officer Foy and Police Officer Kerr entered § 87(2)(b)'s apartment with § 87(2)(b). § 87(2)(b) told the officers she did not want them inside her apartment. After entering the apartment, Police Officer Foy pushed § 87(2)(b) several times. § 87(2)(b) collected his belongings and he left with the officers.

§ 87(2)(b) stated that when the officers knocked on her door, she opened it approximately two inches. When Police Officer Foy explained that § 87(2)(b) wanted to retrieve his belongings, § 87(2)(b) said that he would need a court order and she did not want to let them in. § 87(2)(b) attempted to close the door, but Police Officer Foy put his foot in the doorway. He forced his way into the apartment by extending both his hands outwards and pushing the door open. Once Police Officer Foy crossed the threshold of the door, he pushed § 87(2)(b)'s arms with his hands extending outwards, causing her to stumble backwards. § 87(2)(b) told Police Officer Foy, "I don't want you here" and pushed his arms. Police Officer Foy pushed § 87(2)(b)'s arms multiple times until she was inside the bathroom, which was across from the front door. § 87(2)(b) did not recall how many times Police Officer Foy pushed her. § 87(2)(b) sustained a bruise to her left arm during the incident (BR 19).

Police Officer Foy stated that when § 87(2)(b) initially opened her door, she opened it wide enough that he assumed he could enter her apartment. § 87(2)(b) stepped back and appeared to be giving Police Officer Foy space to walk in, which he believed meant that he could enter. As § 87(2)(b) was standing by the door, she became aggressive, she began screaming, and she started getting close to Police Officer Foy's face. Police Officer Foy entered § 87(2)(b)'s apartment and Police Officer Kerr followed behind him. Police Officer Foy stated that the door to the apartment was opened wide enough that he could comfortably walk in without having to slide between the door and the door frame. § 87(2)(b) did not resist Police Officer Foy entering her apartment and she did not say anything when he did this. Police Officer Foy did not recall placing his foot at the bottom of § 87(2)(b)'s door and he did not recall refusing to allow her to close the door prior to entering. He denied forcing his way into § 87(2)(b)'s apartment by extending both his hands outwards against the door and pushing § 87(2)(b) causing her to stumble and fall backwards. Police Officer Foy did not remember specific statements made by § 87(2)(b) about the officers being inside her apartment but stated that he knew she did not want them there.

Police Officer Foy stated that when he entered the apartment, he attempted to explain the situation to § 87(2)(b) but she started yelling and would not listen to him. She stepped toward him and got close to his face, so he pushed her in the stomach to create space between them. Police Officer Foy told § 87(2)(b) to back up and calm down, but she became more aggressive. § 87(2)(b) got close to Police Officer Foy's face again and he pushed her in the stomach again. After he pushed § 87(2)(b) the second time, she struck him in the shoulder with her right hand in a closed fist. He pushed her backwards multiple times in the stomach until she was in the bathroom. He closed the bathroom door and held it shut. Approximately one minute later, Police Officer Foy let go of the door. § 87(2)(b) exited the bathroom and was no longer aggressive.

During his interview, Police Officer Foy was shown 00:30 to 01:00 of Police Officer Kerr's first BWC video (BR 07). When asked to explain what occurred before the audio begins in the video, Police Officer Foy stated that § 87(2)(b) opened the door and said, "What the fuck do you want." He said that he tried to explain to § 87(2)(b) that § 87(2)(b) wanted to get his belongings and § 87(2)(b) responded, "No get the fuck out of here." He stated he did not recall, independent of the video, telling § 87(2)(b) that he would have to force the door open if she did not let the officers in.

Police Officer Kerr stated that he did not recall how or how far § 87(2)(b) initially opened her door. After she opened her door, the officers entered her apartment, but he did not recall how they did this. When asked if Police Officer Foy used force against § 87(2)(b) to enter the apartment, Police Officer Kerr stated that he did not recall this happening. After the officers entered the apartment, § 87(2)(b) acted belligerently, and she was yelling. § 87(2)(b) got close to the officers in their "personal space" and told them to get out of her apartment. When § 87(2)(b) got close to Police Officer Foy, Police Officer Foy pushed her on her upper shoulder, causing her to back up into the bathroom. Police Officer Kerr estimated that § 87(2)(b) was approximately less than one foot away from Police Officer Foy before he pushed her. Police Officer Kerr did not recall how many times Police Officer Foy pushed § 87(2)(b). When Police Officer Foy pushed § 87(2)(b) it caused her to stumble backward, but she

appeared to maintain control over her body. Police Officer Kerr did not recall how long the officers were inside the apartment before Police Officer Foy pushed § 87(2)(b). Police Officer Kerr did not recall if he witnessed § 87(2)(b) push Police Officer Foy at any point.

At 00:30 of Police Officer Kerr's first BWC video (BR 07), § 87(2)(b)'s door is open less than halfway. § 87(2)(b) appears to be attempting to shut the door when Police Officer Foy says, "You're gonna make me force this door open." He immediately pushes the door open with his right shoulder and forces his way inside the apartment. § 87(2)(b) steps toward Police Officer Foy as she screams, "Get off my fucking door." Police Officer Foy pushes her in her chest, causing her to stumble backward. At 00:45 into the video, § 87(2)(b) repeatedly tells the officers, "Get out of my house." The officers walk further inside the apartment and tell § 87(2)(b) to gather his belongings. Throughout the video, § 87(2)(b) repeatedly tells the officers to get out of her apartment.

At 01:00 of Police Officer Foy's first BWC video (BR 05), § 87(2)(b) screams in Police Officer Foy's face, "Get out of my house." Police Officer Foy immediately pushes her in the chest as he tells her to get out of his face, causing her to stumble backwards. Police Officer Foy steps toward § 87(2)(b) as she repeatedly tells him to get out of her house. Police Officer Foy pushes § 87(2)(b) in her chest again, causing her to stumble backward into the bathroom. She immediately approaches him again and he tells her to step back as he pushes her into the bathroom a second time and closes the door. At 01:50 into the video, the bathroom door opens and § 87(2)(b) approaches Police Officer Foy two more times as she is screaming. Both times she gets close to him, Police Officer Foy pushes her in her torso, and she stumbles backward. After he pushes her the second time, she throws something in his direction. At 04:20 into the video, the officers step into the front doorway of the apartment as § 87(2)(b) repeatedly tells them to leave and to shut her door. The door closes and the officers leave with § 87(2)(b).

The courts have established that warrantless entries into private residences are presumed unconstitutional. Exceptions to this rule include consent, hot pursuit, exigent circumstances, and emergency situations. In Georgia v. Randolph, 547 U.S. 103 (2006) (BR 14), the court held that absent exigent circumstances, a physically present co-occupant's stated refusal to permit entry renders a warrantless entry unreasonable and invalid despite a second present occupant's expressed consent.

Patrol Guide Procedure 221-01 (BR 12) states that force may be used when it is reasonable to ensure the safety of a member of the service or a third person, or otherwise protect life, or when it is reasonable to place a person in custody or to prevent escape from custody. In all circumstances, any application or use of force must be reasonable under the circumstances. All members of the service at a police incident must use reasonable force, employ less lethal alternatives, and prioritize de-escalation, whenever possible. When appropriate and consistent with personal safety, members of the service will use de-escalation techniques to safely gain voluntary compliance from a subject to reduce or eliminate the necessity to use force.

The BWC footage shows that, contrary to the officers' accounts, § 87(2)(b) did not open her door widely and step aside for officers to enter, implying consent to enter, but rather, opened her door only partly, attempted to close it as Police Officer Foy attempted to enter, and repeatedly verbally and physically refused them entry prior to their entering and during the entire time they were inside her apartment after forcibly entering.

Based on the information in the 911 call and what § 87(2)(b) told the officers once they arrived at the location, they reasonably believed that he resided in the apartment and wished for them to enter to assist him in retrieving his belongings § 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

The investigation determined, from the BWC footage, which corroborates § 87(2)(b)'s account of this portion of the incident, that the initial use of physical force by Police Officer Foy was used solely

to overcome the then verbal refusal of § 87(2)(b) who was naked and alone in her apartment at 4:00 AM while two police officers and her ex-boyfriend were attempting to gain entry, to allow him into the apartment. § 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

Allegation (E) Police Officer James Foy damaged § 87(2)(b)'s property.

It is undisputed that after Police Officer Foy entered § 87(2)(b)'s apartment, he pushed her into her bathroom and shut the door. § 87(2)(b) attempted to open the door as Police Officer Foy held it shut. While § 87(2)(b) was inside the bathroom, with the door closed, the door was damaged.

§ 87(2)(b) stated that once Police Officer Foy entered her apartment and pushed her the first time, she pushed his arms back. Police Officer Foy pushed § 87(2)(b)'s arms several more times until she was inside the bathroom. While inside the bathroom, § 87(2)(b) repeatedly screamed for Police Officer Foy to let her out so she could see what was going on in her apartment. Police Officer Foy held his body against the bathroom door while § 87(2)(b) was inside for approximately two minutes. After § 87(2)(b) retrieved his belongings, Police Officer Foy released the bathroom door. Following the incident, § 87(2)(b) noticed that her bathroom door was broken and that there are cracks in the bottom of it (BR 15; BR 16). § 87(2)(b) alleged that the damage was caused by Police Officer Foy as he pushed her into the bathroom.

At 00:50 into Police Officer Foy's first BWC video (BR 05), § 87(2)(b) approaches Police Officer Foy and screams at him to get out of her apartment. He pushes her and she stumbles backwards into the bathroom. Police Officer Foy closes the bathroom door and holds it shut.

At 01:45 into Police Officer Kerr's first BWC video (BR 07), § 87(2)(b) screams at Police Officer Foy to get off of the bathroom door as she hits the door from the inside. When she hits the door, the wood appears to bend near the door handle and it sounds as though the wood on the door cracks. At 02:00 into the video, damage to the door is depicted, which is consistent with the damage depicted in the photos provided to the investigation by § 87(2)(b) (BR 15; BR 16).

Police Officer Foy stated that when he entered § 87(2)(b)'s apartment and she became "aggressive" toward him, he pushed her several times in the stomach until she was in the bathroom. Once she was inside the bathroom, Police Officer Foy closed the door and held it shut. He stated that he did this to isolate and contain § 87(2)(b) so that he could explain the situation to her. While inside the bathroom, § 87(2)(b) kicked and pushed the door, which caused it to crack and break at the bottom. Approximately one minute after § 87(2)(b) entered the bathroom, Police Officer Foy let go of the door because she had stopped kicking it. § 87(2)(b) exited the bathroom and was no longer aggressive.

During his interview, Police Officer Foy was shown the 02:00 mark of Police Officer Kerr's first BWC video (BR 07). He stated that the damage to the bathroom door depicted in this portion of the video was a result of § 87(2)(b) pushing her weight into it and kicking it. Police Officer Foy denied doing anything to damage the door. After viewing photographs of the damage on the bathroom door (BR 15; BR 16), Police Officer Foy stated that he recognized the damage to the door and said that it was caused by § 87(2)(b) kicking it.

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

Allegation (F) Police Officer James Foy spoke discourteously to § 87(2)(b).

§ 87(2)(b) stated that while she was inside the bathroom, she repeatedly screamed for Police Officer Foy to let her out. She did not recall Police Officer Foy issuing any commands to her at this time.

At 00:30 of Police Officer Kerr's first BWC video (BR 07), § 87(2)(b) steps toward Police Officer Foy and screams, "Get off my fucking door." Police Officer Foy pushes her as he says, "Get the fuck off me."

At 01:00 of Police Officer Foy's first BWC video (BR 05), § 87(2)(b) gets close to Police Officer Foy a second time as she screams, "Get out of my house." Police Officer Foy pushes § 87(2)(b) as he says, "Get the fuck out of my face." § 87(2)(b) repeatedly approaches Police Officer Foy and he says, "Get the fuck away from me" and, "Step the fuck back" as he pushes her several more times. At 01:25 into the video, § 87(2)(b) is inside the bathroom as Police Officer Foy holds the door shut. She tells him to get off the door and he says, "You need to fucking relax. You're not putting fucking hands on me. That's not what you fucking do. You're fucking relaxing. That's it." At 02:10 into the video, § 87(2)(b) approaches Police Officer Foy again and he repeatedly says, "Step the fuck back." He also says, "You don't put your fucking hands on me. You fucking listen to me. Get the fuck back." At 03:35 into the video, § 87(2)(b) is on the phone with 911 requesting additional officers and Police Officer Foy says, "Police are on scene." § 87(2)(b) screams, "Shut the fuck up" as she is standing close to him. Police officer Foy says, "Step the fuck back." At 06:10 into the video, § 87(2)(b) approaches Police Officer Foy from behind in the hallway as she screams, "Get the fuck off of me." Police Officer Foy says, "Get the fuck away from me." § 87(2)(b) walks away.

Police Officer Foy stated that when he entered § 87(2)(b)'s apartment, she started yelling and would not listen to him. She stepped forward and got close to his face. Police Officer Foy pushed § 87(2)(b) in the stomach to create space between the two of them. When he did this, he told § 87(2)(b) to back up and calm down. After Police Officer Foy pushed § 87(2)(b) inside the bathroom, he told her to calm down and explained to her what was happening.

After viewing 00:38 to 02:00 of Police Officer Kerr's BWC video (BR 07), Police Officer Foy stated that, independent of the video, he did not recall using profanity during the incident, but acknowledged that the video depicts him doing so. When asked why he used profanity, Police Officer Foy said it was because he was in "the heat of the moment" and § 87(2)(b) was in his face being aggressive. When asked why he told § 87(2)(b) "don't make me put fucking hands on you," Police Officer Foy said it was because she had already become aggressive and put hands on him.

Patrol Guide Procedure 200-02 (BR 17) states members of service must respect the dignity of each individual and render services with courtesy and civility.

Officers may use profanities "in the context of a dynamic situation over which [he or she is] attempting to gain control," but may not do so when it "[serves] no legitimate purpose but to belittle" a civilian (PD v. Pichardo, DAO DCT Case Number 2015-15012) (BR 18).

While Police Officer Foy used the words "fuck" and "fucking" at least 16 times during the course of this incident, given that he only used these words toward § 87(2)(b) within the context of him attempting to create distance between the two of them in response to her repeated attempts to get closer to him, § 87(2)(g)

Civilian and Officer CCRB Histories

- § 87(2)(b)
- Police Officer James Foy has been a member of service for four years and has been a subject in two other CCRB complaints and two other allegations, none of which have been substantiated. § 87(2)(g)
- Police Officer Harry Kerr has been a member of service for four years and has been a subject in two other CCRB complaints and three other allegations, none of which were substantiated.

§ 87(2)(g)

Mediation, Civil and Criminal Histories

- § 87(2)(b) declined to mediate this complaint.
- § 87(2)(b)
- As of May 25, 2021, a Notice of Claim has not been filed regarding this incident (**BR 20**).

Squad: 2

Investigator: Inv. Dean Inv. Dean 6/9/21
Signature Print Title & Name Date

Squad Leader: Alexander Opoku-Agyemang IM Alexander Opoku-Agyemang 6/9/2021
Signature Print Title & Name Date

Reviewer: _____
Signature Print Title & Name Date